

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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RIVERKEEPER, INC., CONNECTICUT FUND FOR
THE ENVIRONMENT, INC. d/b/a SAVE THE
SOUND, BRONX COUNCIL FOR
ENVIRONMENTAL QUALITY, NEWTOWN CREEK
ALLIANCE, HUDSON RIVER WATERTRAIL
ASSOCIATION d/b/a NEW YORK CITY WATER
TRAIL ASSOCIATION, RARITAN BAYKEEPER
d/b/a NY/NJ BAYKEEPER AND WATERKEEPER
ALLIANCE, INC.

Petitioners/Plaintiffs,

-versus-

NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Respondent/Defendant.
-----X

Index No.: _____

**VERIFIED PETITION
AND COMPLAINT**

The Petitioners/Plaintiffs, Riverkeeper, Inc., Connecticut Fund For The Environment, Inc. d/b/a Save The Sound, Bronx Council For Environmental Quality, Newtown Creek Alliance, Hudson River Watertrail Association d/b/a New York City Water Trail Association Raritan Baykeeper d/b/a NY/NJ Baykeeper and Waterkeeper Alliance, Inc (collectively, "Petitioners") by and through their attorneys the PACE ENVIRONMENTAL LITIGATION CLINIC, INC., and their Verified Petition and Complaint, respectfully state as follows:

PRELIMINARY STATEMENT

1. This hybrid Article 78 special proceeding and complaint for declaratory judgment under N.Y.C.P.L.R section 3001 *et seq.* seeks to compel Respondent-Defendant New York City Department of Environmental Protection ("Respondent") to provide notification to the public for combined sewer overflow ("CSO") discharges of untreated and partially untreated sewage under

the Sewage Pollution Right to Know Act (“SPRTKA” or the “Act”). N.Y. ENVIRONMENTAL CONSERVATION LAW (“ECL”) § 17-0826-a(2) (McKinney 2013); 6 N.Y.C.R.R. § 750-2.7(b)(2).

2. Respondent has violated its legal duty under SPRTKA by failing to notify the public after learning of sewage discharges. Publicly owned treatment works (“POTW”) or the operator of a publicly owned sewer system (“POSS”) are required by the Act to publicly report a discharge after discovery. Despite conceding dozens of discharges, the Respondent has developed a pattern of failing to notify the public in nearly every instance of a CSO discharge in violation of the Act; this pattern that continues as of the filing of this action.

3. The Respondent’s failure to notify the public of CSO discharges from the 460 CSO outfalls that dot the shorelines throughout all five New York City boroughs jeopardizes the health and safety of those who live, work, or recreate on the city’s waters, who may unwittingly come in contact with waters contaminated by raw sewage.

PARTIES

4. At all times relevant herein, the Petitioner Riverkeeper is and has been a not-for-profit organization with members in New York State. Riverkeeper’s mission is to protect the water quality and environmental, recreational and commercial integrity of the Hudson River and its tributaries, including the waters in and around New York City. Riverkeeper’s efforts include the restoration of the Hudson River ecosystem, emphasizing minimizing fish kills and water pollution. Riverkeeper maintains a vessel to help carry out its mission as a water pollution watchdog and routinely patrols, monitors and samples New York City waters at issue in this suit. At all times relevant herein, the Petitioner is authorized to conduct business within the State of New York.

5. Petitioner Connecticut Fund for the Environment, Inc. d/b/a Save the Sound (“CFE/Save the Sound”) was founded in 1978 to protect and improve the land, air, and water using

advocacy and scientific expertise to achieve results that benefit our environment for current and future generations. CFE/Save the Sound is a not-for-profit corporation, incorporated under the laws of the State of Connecticut, with its principal place of business in New Haven, Connecticut, and an office in Mamaroneck, New York. CFE/Save the Sound represents more than 4,700 member households in Connecticut and New York. Save the Sound was founded in 1972 as the Long Island Sound Taskforce to preserve and protect Long Island Sound. In 2004, Connecticut Fund for the Environment merged with Save the Sound. CFE/Save the Sound seeks to protect, conserve and enhance the environmental health and natural resources of the Long Island Sound. CFE/Save the Sound has represented the interests of its membership to protect the environment and natural resources in legal proceedings before federal and state courts and administrative agencies.

6. Formed in 1971, the Bronx Council for Environmental Quality (“BCEQ”) is a not-for-profit corporation organized under the laws of New York and based in the Bronx, New York. BCEQ is made up entirely of volunteers and has no staff. As a mission, BCEQ seeks to establish — as an inherent human right — a sound, forward-looking environmental policy regarding an aesthetic, unpolluted, environment protecting a natural and historic heritage. For the past sixteen years, the organization has highlighted the need for clean water at its annual meetings and semi-annual mini-conference for the Bronx and New York City’s waterways. BCEQ focuses on the Bronx, East, Harlem, Hudson, & Hutchinson Rivers; the Bronx Kill; Tibbetts Brook; the Long Island Sound; and Westchester Creek. From the Harlem River’s pollution, including the largest combined sewer outfall in the city, to the Bronx and Hutchinson Rivers and Westchester Creek, which have unabated combined sewer outfalls, our members share concerns that pollution often makes boating, swimming, or fishing on these rivers unsafe.

7. The Newtown Creek Alliance is a not-for-profit organization organized under the laws of New York and located in Brooklyn, New York. Its members consist primarily of individuals that live or work around Newtown Creek. Newtown Creek Alliance is run by dedicated community members seeking to fulfill the organization's mission: reveal, restore and revitalize Newtown Creek. This 3.8-mile waterway, which serves as the Brooklyn/Queens border in the heart of New York City, has suffered centuries of environmental abuse and neglect resulting in its designation as a federal Superfund site. In addition to historical contamination, water quality in Newtown Creek is significantly impaired by the billions of gallons of untreated sewage and stormwater that are discharged into its stagnant tributaries each year. Poor water quality poses significant threats to the local marine ecosystem and restricts the community's ability to safely access and utilize Newtown Creek as an asset for recreation and education. The untreated sewage, stormwater runoff and plastic debris that results from CSOs makes the Creek unsightly and odorous for shoreline visitors while posing great health risk to a growing number of recreational users (including Newtown Creek Alliance members) who use the creek as canoers, kayakers and people engaged in recreational fishing. Newtown Creek Alliance is also involved in restoration and hands-on research projects, which require close proximity or contact with surface waters. Because of CSOs, some of the Alliance's activities must be re-scheduled after rain events to lessen risk to human health.

8. The New York City Water Trail Association ("NYCWTA") is an advocacy group operating under the aegis of the Hudson River Watertrail Association, a non-profit corporation organized under the laws of New York. NYCWTA aims to represent the more than twenty community boating organizations now located in and around New York City. The group's focus is the safe use of the Water Trail, created by the NYC Parks Department in 2008, the creation and

improvement of resources for non-motorized small boat users; and the promotion of free access to the public waterways. For the past six years NYCWTA has coordinated a water quality monitoring program that tests weekly for sewage pollution at more than 70 sites in or near New York Harbor. The primary purpose of that program is to provide our constituency (human-powered boaters) with a predictive database so that they can make informed decisions about when and where to launch. Perhaps more than any other user group, that constituency is impacted by the city's ongoing sewage discharges and the consequent risk of exposure to harmful pathogens while recreating on the public waterways.

9. Raritan Baykeeper d/b/a/ NY/NJ Baykeeper (“NY/NJ Baykeeper”), is a 501(c)(3) not-for-profit organized under the laws of New Jersey. Its members are local residents in communities around the New York-New Jersey Harbor Estuary and its watershed. NY/NJ Baykeeper is dedicated to protecting the health of its waterways and watershed through advocacy, legal actions, educational programs, restoration projects and outreach. Its work focuses on protecting, preserving and restoring the various fish and wildlife habitats that exist within the watersheds located in urban areas of northern New Jersey and New York City, including the waters at issue in this action. NY/NJ Baykeeper often represents the interest of underserved and front-line communities. The impact of poor water quality affects these communities the most, drastically reducing their already limited access to fishable, swimmable water. Along waters of concern to NY/NJ Baykeeper members, such as Upper New York Bay, Kill Van Kull, Arthur Kill, and tributaries of Jamaica Bay, lack of notice of sewage discharges puts families at risk when kayaking, canoeing, or engaging in any other activity that might cause them to contact the water. Ongoing pollution causes an overall fear or apprehension among members of adjacent communities in regard to their willingness to use their local waterways. Some are forced to travel well outside of

their neighborhoods to access safe, clean water; for others, the ability to travel is limited or non-existent and they are prevented from accessing any safe, clean water.

10. Plaintiff Petitioner Waterkeeper Alliance ("Waterkeeper") is a not-for-profit corporation organized under the laws of New York. Waterkeeper is a member-supported, international environmental advocacy organization with its headquarters in New York, New York. Waterkeeper strengthens and grows a global network of grassroots leaders protecting everyone's right to clean water. Comprised of approximately 350 Waterkeeper Member Organizations and Affiliates around the world (including Petitioners/Plaintiffs Riverkeeper, Inc., Raritan Baykeeper, Inc., and CFE/Save the Sound), Waterkeeper is the largest and fastest growing non-profit focused solely on clean water. Waterkeeper's goal is drinkable, swimmable, and fishable water everywhere. Under its Clean Water Defense campaign, Waterkeeper fights attempts to weaken current environmental protections such as the Clean Water Act and promotes stronger legal safeguards for the world's water resources. Waterkeeper holds polluters accountable and advocates for strong regulations and vigilant enforcement of environmental laws.

11. Respondent New York City Department of Environmental Protection is an agency of the City of New York, with its headquarters in Flushing, New York. As the city agency responsible for New York City's environment, Respondent regulates local air and water quality, hazardous waste, and critical quality of life issues, including noise.

STANDING

12. The Act was created in part to provide raw sewage discharge information to individuals that use or recreate on waters affected by such discharges, including members of the Petitioner organizations, in order to notify them that sewage is entering a waterbody and to protect their health and safety. If they are not notified by owner or operator of the POTW or POSS of any

sewage discharges, they will not receive this information and their health will be negatively affected by the lack of information because they may unknowingly come in contact with the water when there have been raw sewage discharges.

13. The public notification provision of the Act is meant to inform Petitioners and their members, among others, about the frequency of raw sewage discharges and the safety of the various waterbodies around New York City. Monitoring pollution discharges and protecting the water quality of these waters is central to Petitioners' missions and their members' interests.

14. Petitioners' staffs' and members' health and safety are jeopardized by the lack of discharge notifications because they may unwittingly come into contact with contaminated waters through their routine water quality monitoring and sampling activities when there have been raw sewage discharges.

15. Petitioners' staff and members suffer or are at increased risk of suffering illnesses, including gastroenteritis, skin rashes, pinkeye, ear, nose and throat problems, respiratory infections, meningitis, and hepatitis, when they come into contact with raw sewage without proper notice.

16. Riverkeeper member Timothy Willis Elkins works for Newtown Creek Alliance and has been a part of Riverkeeper's organization for several years. As set forth in detail in his affidavit, he has individualized harm from the actions of the defendant (See attached exhibit A).

JURISDICTION AND VENUE

17. This Court has jurisdiction pursuant to N.Y.C.P.L.R. sections 504(3), 506(b) and 7804(b) *et seq.* to review administrative action or the failure of public officials or bodies to perform a duty enjoined by law.

18. Article 78 actions can be brought when a public official or body fails to perform a mandated action or performs an unlawful action. N.Y.C.P.L.R. §§ 7803(1) & (3).

19. As the New York Court of Appeals has recognized, a nondiscretionary duty may “derive from the Federal or State Constitutions, statutes, or regulations.” *Klostermann v. Cuomo*, 61 N.Y.2d 525, 541 (1984).

20. Respondent has failed repeatedly and continues to fail to perform its public notification duty under SPRTKA and is therefore properly the subject of an Article 78 proceeding.

21. This court also has jurisdiction pursuant to N.Y.C.P.L.R. section 3001 to render relief declaring Respondent’s failure to issue public notices for all CSO discharge events is unlawful.

22. Once the Court has assumed jurisdiction, it has the power to grant declaratory relief and supplement it with proper coercive relief, whether requested or not specifically requested, in the complaint. *New York Cent. R.R. v. Lefkowitz*, 12 N.Y.2d 305, 310 (1963).

23. Petitioners’ allegations involve real and actual omissions by Respondent that have injured Petitioners and their members, and from which injury there is no other remedy at law. Petitioners do not request an advisory opinion, but rather request that the Court declare that Respondent’s actions complained of herein violate SPRTKA and 6 N.Y.C.R.R. § 750-2.7(b)(2) and order appropriate relief, as described below.

24. Venue in Queens County is proper pursuant to N.Y.C.P.L.R. § 506(b) as claims are asserted against the City of New York, the causes of action arise, *inter alia*, in Queens County, and Respondent has offices in Queens County.

FACTUAL BACKGROUND

25. The Petitioners routinely observe or are otherwise aware of untreated and partially treated sewage discharges that occur in waterways throughout New York City and in the East River in particular.

26. When it rains significantly in New York City, stormwater often combines with untreated sewage to overwhelm the city's water treatment capacity, resulting in direct pollutant discharges to waterways known as "combined sewer overflows" or CSOs.

27. Untreated sewage contains human excrement, industrial drainage, and debris such as sanitary towels, medications, condoms and plastics. Raw sewage fouls places where people of all ages, ethnicities, and income levels live, fish, swim, row, kayak, or engage in other direct water contact activities.

28. Untreated sewage and polluted runoff in the water contain bacteria and other pathogens that cause gastroenteritis, skin rashes, pinkeye, ear, nose and throat problems, respiratory infections, meningitis, and hepatitis. Consequences are worse for children, the elderly, pregnant women, and anyone with a weakened immune system. As a result, New Yorkers' use of and recreation on the waters is significantly impaired by sewage discharges.

29. Kayakers, canoers, and other boaters commonly use, monitor, sample, recreate on, enjoy and come into direct contact with New York City waters, including the East River, putting them at risk of sewage-related illnesses.

30. There are roughly 460 CSO outfall discharge points throughout all boroughs of New York City, roughly 154 of which are on the East River.

31. After every combined sewer overflow event, Respondent is required under SPRTKA and state regulations to warn the public. *See* ECL § 17-0826-a(2); 6 N.Y.C.R.R. § 750-2.7(b)(2).

32. Where an outfall is monitored, this notification must come “as soon as possible, but no later than four hours from discovery of the discharge” by the Act that such an event has occurred or continues to occur. 6 N.Y.C.R.R. § 750-2.7(b)(2)(ii)(b).

33. Alternatively, if Respondent has no “real-time telemetered discharge monitoring and detection,” the applicable regulations require that Respondent “expeditiously issue advisories to the general public through appropriate electronic media as determined by the department when, based on actual rainfall data or predictive models, enough rain has fallen that combined sewer overflows may discharge. Advisories may be provided on a waterbody basis rather than by individual combined sewer overflow points.” 6 N.Y.C.R.R. § 750-2.7(b)(2)(iii).

34. 6 N.Y.C.R.R. § 750-2.7(b)(2)(iii) does not define “expeditiously,” but in order to be in compliance with the Act, the notifications to the public need to be released “no later than four hours” after discovery of the discharge. ECL § 17-0826-a(2). Because the regulation cannot alter the specific terms of the Act, “expeditiously” must therefore mean four hours or less.

35. Respondent sends some limited information to the public regarding water quality or CSO events through two means: the NY Alert system and Waterbody Advisories. As described below, neither of these systems satisfies the Act, and, even if either did, many CSO events are unreported under either system.

NY Alerts

36. Respondent sometimes provides limited information through the “NY Alert” system based on rainfall, but such alerts fail to identify either the combined sewer overflow point

or the receiving waterbody and, in fact, provide inaccurate and misleading information about whether and to what extent sewage discharges have occurred in the following ways:

- a. Instead of listing a “discharge location,” Respondent’s NY Alerts refer to the Current NYC Waterbodies Advisory website which contains information on water quality but does not provide information on whether and to what extent there has been a CSO discharge.
- b. Similarly, instead of listing the “location details,” Respondent’s NY Alerts refer to the Current NYC Waterbodies Advisory site which contains information on water quality but does not provide information on whether and to what extent there has been a CSO discharge.
- c. Instead of listing the “waterbody affected” Respondent’s NY Alerts Refers to the Current NYC Waterbodies Advisory site which contains information on water quality but does not provide information on whether and to what extent there has been a CSO discharge.
- d. On information and belief, the “discharge duration” is always listed as two hours and is not based on an actual estimate of duration.
- e. On information and belief, the volume/rate of discharge is always listed as 0 gallons per minute estimated and is not based upon the actual or estimated volume or rate of discharge.

37. An example of one such NY Alert is annexed hereto as Exhibit B.

38. The information provided is inaccurate and misleading in that the NY Alert refers to the Current NYC Waterbody Advisory site for the location and waterbody affected, but the website does not, in fact, provide information based upon whether a discharge took place, but

instead upon whether a projected water quality violation occurred. Thus, in an instance where there was a sewage discharge into a waterbody but no corresponding predicted water quality violation, a NY Alerts recipient would reasonably but mistakenly assume there was no sewage discharge into the water body at all based upon the information provided in the alert.

39. Thus, the NY Alert system does not comply with the Act. The NY Alerts do not come within four hours of the CSO event, no CSO outfall or specific waterbody is identified, and virtually none of the information required by the Act is included in the NY Alerts.

Waterbody Advisories

40. Upon information and belief, the Current NYC Waterbody Advisory website is not based upon actual sewage discharges to the water body as required by the law. Respondent issues Waterbody Advisories only when, according to its modeling systems, it expects that the volume and bacterial concentration of CSO discharges will have been so severe in the respective receiving waterbody or waterbodies that state water quality standards for primary contact waters under 6 N.Y.C.R.R. part 703 have been exceeded or otherwise violated throughout the waterbody segment.

41. Upon information and belief, when Respondent expects water quality standards will not be exceeded following a sewage overflow or while such overflow is still occurring, Respondent issues no Water Quality Advisory.

42. The Respondent issues any such Water Quality Advisories only once per day via text and/or email through the Notify NYC system. These notifications come the morning after a rainfall, irrespective of when it rained the day before or when any discharge occurred.

43. Upon information and belief, the Respondent issued *no* Water Quality Advisories for the East River in 2018, yet in its 2018 SPDES Permit Report (issued in May 2019) Respondent later acknowledged dozens of CSO discharge events occurred in the East River during 2018.

44. By way of example, according to the 2018 SPDES Permit Report, the five East River CSO outfalls with the greatest number of CSO discharges were HP-011 with 82 CSO events in 2018, HP-025 with 82 events in 2018, TI-003 with 75 events in 2018, BB-034 with 73 events in 2018, and BB-041 with 70 events in 2018. Respondent did not notify the public of a single one of these CSO discharges.

45. In short, the Waterbody Advisories do not comply with the Act: they are not necessarily issued within four hours of the CSO event, do not identify any specific CSO discharge, and for the vast majority of CSO events Respondent issues no Waterbody Advisory at all.

CSO Events in 2019

46. Using daily precipitation data from the National Oceanic and Atmospheric Association (“NOAA”) New York City Central Park Station, Petitioners cross referenced the most intense precipitation days against Respondent’s record of CSO events for each outfall, as detailed in the 2018 SPDES Permit Report. Based on the number of CSO events in 2018, Petitioners identified the respective intensity of rainfall over 24-hours that would trigger a CSO event. Petitioners estimate the volume of precipitation over a 24-hour period that typically triggers a CSO event at each of five example outfalls in the East River:

- a. Upon information and belief, the volume of precipitation in 24-hours that triggers a CSO event at outfall HP-011 and outfall HP-025 is roughly 0.18 inches.
- b. Upon information and belief, the volume of precipitation in 24-hours that triggers a CSO event at outfall TI-003 is roughly 0.22 inches.
- c. Upon information and belief, the volume of precipitation in 24-hours that triggers a CSO event at outfall BB-034 is roughly 0.24 inches.

d. Upon information and belief, the volume of precipitation in 24-hours that triggers a CSO event at outfall BB-041 is roughly 0.25 inches.

47. Upon information and belief and based on Respondent's own reporting of past CSO discharges, any 24-hour period that incurred these volumes of rainfall resulted in a discharge into the East River, for which Respondent was required to notify the public.

48. Based on these precipitation volumes, as of the filing of this action, the five CSO outfalls identified above likely discharged raw or partially treated sewage to the East River at least 52 times in 2019, on the following dates: 1/5/2019, 1/19/19, 1/20/2019, 1/24/2019, 1/29/2019, 2/6/2019, 2/8/2019, 2/12/2019, 2/20/2019, 2/24/2019, 3/2/2019, 3/3/2019, 3/4/2019, 3/10/2019, 3/15/2019, 3/21/2019, 3/22/2019, 4/5/2019, 4/8/2019, 4/12/2019, 4/13/2019, 4/15/2019, 4/20/2019, 4/22/2019, 4/26/2019, 5/5/2019, 5/12/2019, 5/13/2019, 5/14/2019, 5/23/2019, 5/26/2019, 5/29/2019, 5/30/2019, 6/2/2019, 6/10/2019, 6/11/2019, 6/13/2019, 6/18/2019, 6/20/2019, 6/21/2019, 6/25/2019, 7/11/2019, 7/17/2019, 7/18/2019, 7/22/2019, 7/23/2019, 7/31/2019, 8/3/2019, 8/7/2019, 8/18/2019, and 8/22/2019.

49. As described above, neither the NY Alert system nor the Waterbody Advisory system comply with the Act. As such, Respondent provided *no* notice of these CSOs to the public, in violation of the Act.

50. Even assuming the NY Alert system complied with the act, on the following dates, upon information and belief, enough rain fell to trigger a CSO event into the East River, but no NY Alert was released: 1/19/2019, 1/29/2019, 2/12/2019, 2/20/2019, 3/15/2019, 3/21/2019, 4/5/2019, 4/22/2019, 5/14/2019, 5/26/2019, 6/2/2019, 6/10/2019, 6/13/2019, 6/18/2019, 6/25/2019, 7/11/2019, 7/17/2019, 7/22/2019, 7/31/2019, and 8/7/2019.

51. For Reporting purposes under its Clean Water Act permit, Respondent keeps records of such discharges and will have more precise data on the number of days of discharges.

52. Likewise, there were only eleven East River Waterbody Advisories issued on the following dates in 2019: 5/5/2019, 5/6/2019, 5/23/2019, 6/11/2019, 6/19/2019, 6/20/2019, 6/21/2019, 7/18/2019, 7/19/2019, 7/23/2019 and 7/24/019. So for the vast majority of the 52 CSO events thus far in 2019, Respondent has issued *no* Waterbody Advisory.

53. In short, no notifications for the East River were released to the public on the eighty or more days when CSO discharges occurred in 2018. For 2019, no or virtually no notifications were issued within four hours of when discharges occurred, the “notifications” issued on some dates through NY Alerts or Waterbody Advisories did not comply with the Act, and for many of the CSO events in 2019, no notification was provided *at all* even including the NY Alert system or the Waterbody Advisory system.

54. This pattern has jeopardized and continues to jeopardize the health of Petitioners’ staff and members, as well as all those who unknowingly come in contact with waters that have been contaminated by CSOs, including, but not limited to, those who live, work or recreate such waters.

55. The situation in the East River is one example of Respondent’s discharge notification procedures. Respondent’s ongoing lack of sewage discharge notifications is likewise true of all or nearly all of the 460 CSO outfalls throughout New York City.

56. Therefore, Respondent has violated and continues to violate SPRTKA.

STATUTORY BACKGROUND

57. In 2013, New York State enacted the Sewage Pollution Right to Know Act to help the New York State Department of Environmental Conservation (“DEC”) track CSO discharges.

58. In addition, the Act states that there needs to be a public notification to warn residents that live nearby waterbodies which have been polluted by sewage discharges to protect their health and safety. ECL § 17-0826-a(4); N.Y. State Dep't of Env'tl. Conservation, Summary of Revised Regulatory Impact Statement for SPRTK, *available at* <https://www.dec.ny.gov/regulations/106449.html> (last accessed Sept. 3, 2019).

59. Under SPRTKA, the Respondent must notify DEC within two hours of a discharge of raw or partially treated sewage. This notification must include, to the extent available:

- (a) the volume and treated state of the discharge;
- (b) the date and time of the discharge
- (c) the expected duration of the discharge;
- (d) a brief description of the steps being taken to contain the discharge except for wet weather combined sewer overflow discharges;
- (e) the location of the discharge, with the maximum level of specificity possible;
- and
- (f) the reason for the discharge.

ECL § 17-0826-A(1); *see also* 6 N.Y.C.R.R. 750-2.7(b)(2)(i) (containing similar requirements).

60. Respondent must also similarly notify the local health department and the public within four hours of the discharge. ECL § 17-0826-a(2). Given that the notifications to DEC and the public have the same trigger, implicit in the structure of the statute and regulations is that the public should get the same or nearly the same information transmitted to DEC.

61. Pursuant to the regulations promulgated according to subdivision 4 of the Act, Respondent must notify the general public no later than four hours from discovery of any discharges of untreated sewage to surface water, no matter the volume:

As soon as possible, but no later than four hours from discovery of the discharge, owners and operators of POTWs and POSSs must notify the general public of untreated or partially treated sewage discharges, including combined sewer overflows, to waters of the State except underground waters, through appropriate electronic media as determined by the department.

6 N.Y.C.R.R. § 750-2.7(b)(2)(ii)(b).

62. Alternatively, to the extent Respondent's CSO outfalls do not have "real-time telemetered discharge monitoring and detection," regulations require that Respondents must "expeditiously issue advisories to the general public" when "enough rain has fallen that combined sewer overflows may discharge." 6 N.Y.C.R.R. 750-2.7(b)(2)(iii). These advisories may be provided on a waterbody basis rather than by individual combined sewer overflow points. *Id.*

63. As previously stated, "expeditiously" is not defined but must be no more than four hours in order to be in compliance with the Act. *See* ECL § 17-0826-a(2) (requiring notification of the applicable health department and the public within four hours of discovery of a discharge).

64. As detailed above, Respondent issues Waterbody Advisories only sporadically, and for many discharges does not issue any advisory.

65. Likewise, Respondent's NY Alerts do not provide notification on an outfall basis (*see* section 750-2.7(b)(2)(ii)) or any advisory on a waterbody basis (*see* section 750-2.7(b)(2)(iii)) and the NY Alerts are not issued within four hours of discovery of a discharge.

66. Although the "form" for each NY Alert contains lines for "Location," and "Waterbody affected," upon information and belief the NY Alert refers the recipient to the Current NYC Waterbody Advisories website for this information but the information on the website is based upon water quality, not actual or projected sewage discharges. Respondent's actual NY Alerts do not include details necessary to understand when or where CSOs are discharging or the nature of such discharge.

67. Respondent's repeated failures to comply with SPRTKA constitute instances where the body or officer has not performed a duty imposed on it by law. N.Y.C.P.L.R. § 7803(1).

68. Petitioners seek a mandamus to compel the Respondent to release notifications to the public concerning past discharges.

69. Petitioners also seek a declaration that Respondent's practices of issuing Water Quality Advisories up to 24 hours following only the most severe discharges and NY Alerts that provide no information regarding nature or extent of the discharge or waterbody affected are insufficient to comply with SPRTKA. Further, Petitioners seek an order to compel Respondent to modify its notification system to release sewage discharge notifications consistent with the Act.

FIRST CAUSE OF ACTION:

MANDAMUS TO COMPEL NEW YORK CITY TO PROMPTLY NOTIFY THE PUBLIC OF DISCHARGES OF UNTREATED AND PARTIALLY UNTREATED SEWAGE

70. Petitioners repeat and reallege the information contained in the preceding paragraphs.

71. Respondent has not sufficiently notified the public about instances of untreated and partially treated sewage discharges, which has jeopardized the health and safety of the residents that live, work or recreate near the East River and other waters throughout New York City.

72. CSO discharges occurred in the East River on 82 days in 2018 and likely occurred on 52 days so far in 2019.

73. Upon information and belief, even if Respondent's Water Quality Advisories were deemed sufficient to comply with the Act, Respondent failed to issue 41 notices in 2019, and Respondent's eleven Water Quality Advisories were not issued within four hours of any of these the CSO discharges, as required by the Act.

74. Notifications are necessary more than once a day in order to correctly ascertain when and how long the CSO is actually occurring. By only notifying the public once per day, there is no way for the public to actually know when the CSO is expected to begin or end.

75. Respondent's NY Alerts, to the extent that they were given, similarly did not provide proper notice of any specific discharge, did not provide any information regarding the nature, volume or location of the discharge, and are not issued on a waterbody or a specific outfall basis. As such, the NY Alerts do not provide any notice or advisory consistent with the Act or applicable regulations.

76. Respondent's NY Alerts not only fail to comply with the law and regulations, they actually provide *inaccurate* information. For the fields reflecting "sewage discharge location" and "waterbody," the NY Alerts refers the reader to the Water Quality Advisory website. But the website deals only with water quality alerts, not with sewage discharges. Therefore, individuals could reasonably but mistakenly read this to mean that whenever the website lists no issues with a waterbody that means there have been no sewage discharges.

77. Given that the water quality alerts occur far less frequently than the NY Alerts, this reporting system is highly misleading and confusing for the public. Specifically, the Water Quality Advisories are issued only when a violation of fecal coliform standards for primary contact waters is expected, based on NYC's modeling system. Discharges occur much more frequently and often do not cause violations of fecal coliform standards.

78. In addition, Respondent issued *no* NY Alert on the days of at least 20 CSO discharges: 1/19/2019, 1/29/2019, 2/12/2019, 2/20/2019, 3/15/2019, 3/21/2019, 4/5/2019, 4/22/2019, 5/14/2019, 5/26/2019, 6/2/2019, 6/10/2019, 6/13/2019, 6/18/2019, 6/25/2019, 7/11/2019, 7/17/2019, 7/22/2019, 7/31/2019, and 8/7/2019.

79. The lack of notification harms residents, workers, boaters, fishers and recreators who are contacting the water near CSO discharge points, where the near-shore conditions may be much more dangerous than the waterbody segment-wide conditions. The unhelpful NY Alerts, coupled with a frequent lack of Waterbody Advisory, often leaves New Yorkers unaware that their local CSO is actually discharging.

80. These repeated failures to comply with the public notice requirement in SPRTKA for the East River sewage discharges alone constitute a multitude of instances where Respondent has not performed a duty imposed on it by law. N.Y.C.P.L.R. § 7803(1). Other similar omissions occurred upon discharges from sewer outfalls throughout New York City.

81. In order to adequately inform and assist the public, the Respondent must make notifications to the public about discharges of untreated and partially treated sewage within four hours of each such discharge where CSO outfalls are monitored and expeditiously issue advisories on a waterbody basis where not monitored.

82. Therefore, the Court should order a mandamus to compel Respondent to release notifications to the public concerning past discharges.

SECOND CAUSE OF ACTION:

DECLARATORY JUDGMENT THAT NEW YORK CITY HAS NOT COMPLIED WITH THE ACT AND MUST PROMPTLY NOTIFY THE PUBLIC OF DISCHARGES OF UNTREATED AND PARTIALLY UNTREATED SEWAGE

83. Petitioners repeat and reallege the information contained in the preceding paragraphs.

84. Respondent has not sufficiently notified the public about instances of untreated and partially treated sewage discharges, which has jeopardized the health and safety of the residents that live, work or recreate near the East River and other waters throughout New York City.

85. CSO discharges occurred in the East River on 82 days in 2018 and likely occurred on 52 days so far in 2019.

86. Upon information and belief, Respondent failed to issue 41 notices in 2019, and, even if they were deemed compliant with SPRTKA, Respondent's [eleven] Water Quality Advisories were not issued within four hours of any of these the CSO discharges, as required by the Act.

87. Notifications are necessary more than once a day in order to correctly ascertain when and how long the CSO is actually occurring. By only notifying the public once per day, there is no way for the public to actually know when the CSO is expected to begin or end.

88. Respondent's NY Alerts, to the extent that they were given, similarly did not provide proper notice of any specific discharge, did not provide any information regarding the nature, volume or location of the discharge, and are not issued on a waterbody or a specific outfall basis. As such, the NY Alerts do not provide any notice or advisory consistent with the Act or applicable regulations.

89. Respondent's NY Alerts not only fail to comply with the law and regulations, they actually provide *inaccurate* information. For the fields reflecting "sewage discharge location" and "waterbody," the NY Alerts refers the reader to the Water Quality Advisory website. But the website deals only with water quality alerts, not with sewage discharges. Therefore, individuals could reasonably but mistakenly read this to mean that whenever the website lists no issues with a waterbody that means there have been no sewage discharges.

90. Given that the water quality alerts occur far less frequently than the NY Alerts, this reporting system is highly misleading and confusing for the public. Specifically, the Water Quality Advisories are issued only when a violation of fecal coliform standards for primary contact waters

is expected, based on NYC's modeling system. Discharges occur much more frequently and often do not cause violations of fecal coliform standards.

91. In addition, Respondent issued *no* NY Alert on the days of at least 20 CSO discharges: 1/19/2019, 1/29/2019, 2/12/2019, 2/20/2019, 3/15/2019, 3/21/2019, 4/5/2019, 4/22/2019, 5/14/2019, 5/26/2019, 6/2/2019, 6/10/2019, 6/13/2019, 6/18/2019, 6/25/2019, 7/11/2019, 7/17/2019, 7/22/2019, 7/31/2019, and 8/7/2019.

92. The lack of notification harms residents, workers, boaters, fishers and recreators who are contacting the water near CSO discharge points, where the near-shore conditions may be much more dangerous than the waterbody segment-wide conditions. The unhelpful NY Alerts, coupled with a frequent lack of Waterbody Advisory, could leave New Yorkers unaware that their local CSO is actually discharging.

93. These repeated failures to comply with the public notice requirement in SPRTKA for the East River sewage discharges alone constitute a multitude of instances where Respondent has not performed a duty imposed on it by law. N.Y.C.P.L.R. § 7803(1). Other similar omissions occurred upon discharges from sewer outfalls throughout New York City.

94. In order to adequately inform and assist the public, the Respondent must make notifications to the public about discharges of untreated and partially treated sewage within four hours of each such discharge. *See* E.C.L. § 17-0826a(2) (requiring notice to the public within four hours of discovery of a discharge).

95. Therefore, the Court should declare that Respondent's ongoing practices violate the Act and that to comply with the Act, Respondent must modify its sewage discharge notification so that it notifies the public of CSO events within four hours of the discovery of the discharge.

PRAYER FOR RELIEF

WHEREFORE, the Petitioners respectfully demand an appropriate judgment from this

Court as follows:

- a) A declaration that Respondent's past failure to sufficiently notify the public of sewage discharges on a waterbody or individual CSO basis was in violation of law;
- a) A declaration that Respondent's once daily issuance of Water Quality Advisories for only the most severe CSO discharges and NY Alerts in their current form are insufficient to comply with SPRTKA;
- b) Mandamus compelling the city to notify to the public of past untreated or partially untreated sewage discharges on either a waterbody or individual CSO basis;
- c) An order directing Respondent to develop a protocol by which it will notify the public expeditiously on a waterbody or individual CSO basis in compliance with the statute when it learns of untreated or partially treated sewage discharges; and
- d) Grant Petitioners such other and further relief as this Court may deem just and proper.

Dated: October 3, 2019

White Plains, New York



Todd D. Ommen
PACE ENVIRONMENTAL LITIGATION
CLINIC

Attorneys for Petitioners

78 North Broadway

White Plains, New York 10603

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X

RIVERKEEPER, INC., et al.

Petitioners,

-versus-

Index No.: _____

VERIFICATION

NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Respondent.

-----X

STATE OF NEW YORK)
) ss:
WESTCHESTER COUNTY)

Michael Dulong, being duly sworn, deposes and says that he is a Senior Attorney for Petitioner organization, RIVERKEEPER, INC., and hereby states that he has read the annexed Petition, knows the contents thereof and the same is true to his knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters he believes them to be true. His belief to those matters therein not stated upon knowledge is based upon the files maintained by the Pace Environmental Litigation Clinic.

Michael Dulong

Sworn to me before this
3 day of October, 2018


NOTARY PUBLIC
JENNIFER A. RUHLE
Notary Public, State of New York
No. 01RU6163738
Qualified in Westchester County
Commission Expires April 02, 2023